Supreme Court, U.S.
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CASE NO

THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

LAWRENCE MOORE,

PLAINTIFF/PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 569; PAUL BLACKWOOD; THOMAS PRIDEMORE; JAMES WESTFALL; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL, INC.; FISCHBACH & MOORE, INC.

DEFENDANTS/RESPONDENTS.

PETITION FOR
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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137 pp

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Denying Motion for Recusal

(Disqualification) of Counsel

Filed May 1, 1989.

Plaintiff Lawrence Moore's Motion for Recusal (disqualification) of Counsel came on for hearing before this Court on Monday, April 24, 1989, at 10:30 A.M. Plaintiff's Motion sought, inter alia, to disqualify counsel for IBEW Local 569 from representing certain of the individual Local Union Defendants whom Plaintiff has alleged have violated their fiduciary duties under 29 U.S.C. §501. Appearing for Plaintiff and moving party, Lawrence Moore, was Lawrence Moore In Pro Per; Plaintiff Walter Whelan appeared by and through his counsel, George de la Flor; Defendants IBEW Local 569 and the individual Local Union officers/employees appeared by and through their counsel, Abe F. Levy and Lewis N. Levy, and Defendant IBEW International appeared by and through its local counsel, Jennifer T.

Messersmith.

GOOD CAUSE APPEARING THEREFORE, and based upon the parties' points and authorities and oral arguments before the Court, the Court denied Plaintiff's Motion for Disqualification on the basis that Plaintiff had not demonstrated a reasonable likelihood of success with respect to his prosecution of a breach of fiduciary duty action, under 29 U.S.C. §501, against the individual officers who were the subject of the instant Motion for Recusal (Disqualification). Additionally, the Court orders Plaintiff and moving party, Lawrence Moore, to reimburse the Defendants who responded to this Motion all costs, including reasonable attorney's fees, generated in opposing the instant motion.

IT IS SO ORDERED. DATED: May 1, 1989

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Order Granting Atkinson Mechanical Contractors Motion for Summary Judgment

Filed May 10, 1990

Defendant Atkinson Mechanical Contractors, Inc's Motion for Summary Judgment/Adjudication as to Plaintiff's Fifth Cause of Action in the Second Amended Complaint came on for a hearing before this court on April 16, 1990 at 10:30 A.M., before the Honorable Rudi M. Brewster, presiding. Theodore R. Scott of Littler, Mendelson, Fastiff & Tichy, appeared on behalf of moving party. Plaintiff Lawrence Moore appeared In Propria Persona.

Good cause appearing therefore, and based on the parties' arguments as raised in their moving, opposing and reply papers, their oral arguments before this court, and the court's files in this matter, which are incorporated herein as though fully set forth,

IT IS ORDERED that Defendant Atkinson's Motion for Summary Judgment as to the

allegations of Plaintiff's Fifth Cause of Action in the Second Amended Complaint is hereby granted.

IT IS SO ORDERED. DATED: May 9, 1990

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order Denying F & M's Motion for Summary Judgment on Plaintiff's Fifth Cause of Action - March 19, 1991

The above captioned matter came on regularly for hearing on February 25, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona, and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared for defendant Fischbach & Moore. Upon consideration of Fischbach & Moore's motion for summary judgment on the fifth cause of action, and the oral argument thereon, the court hereby enters the following memorandum opinion and order.

FACTUAL AND PROCEDURAL BACKGROUND

On February 20, 1990, this court heard Fischbach & Moore's motion for summary judgment on the seventh cause of action of plaintiff's second amended complaint. That cause of action alleged that Fischbach & Moore provided employees to another signatory employer --

Corbin-Dykes -- without following the provisions of § 4 of the Inside Agreement, which provides certain procedures governing the hiring of employees from the out-of-work list. In its motion for summary judgment, Fischbach & Moore argued that jurisdiction over this cause of action rested with the National Labor Relations Board (NLRB), not the district court, and that Fischbach & Moore and Corbin-Dykes were one employer under the Inside Agreement.

In denying Fischbach & Moore's motion for summary judgment this court held that the federal district court and the NLRB have concurrent jurisdiction to hear claims based on the breach of a collective bargaining agreement, and that issues of fact remained as to whether Fischbach & Moore and Corbin-Dykes were separate entities for purposes of the Inside Agreement.

In the third amended complaint, the allegation against Fischbach & Moore now comprises the fifth cause of action, and has been slightly reformulated. However, the

essential allegations are identical.

Fischbach & Moore now asserts that the present action against it is barred by *res judicata* in light of an adverse ruling suffered by the International Brotherhood of Electrical Workers ("IBEW") on an identical allegation before the Council on Industrial Relations for the Electrical Contracting Industry ("Council"). Fischbach & Moore alleges that plaintiff had brought a grievance against the IBEW in which plaintiff claimed that the IBEW had failed in its duty of fair representation by allowing Fischbach & Moore to transfer employees to Corbin-Dykes.1 By letter dated August 24, 1990, counsel for the Local notified plaintiff that a grievance procedure had been commenced before the Labor-Management Committee ("Committee") in San Diego, pursuant to the

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1 Local Union 569 of the IBEW ("Local") and the IBEW, both defendants in the present case, have jointly filed a brief in support of Fischbach & Moore. As their only point of contention with Fischbach & Moore, the Local and the IBEW assert that this grievance was in fact filed against Fischbach & Moore, not the IBEW.

Inside Agreement. Cooper Declaration, Exhibit B. The Committee deadlocked on the grievance, and forwarded it to the Council, which sits in Washington, D.C. Cooper Declaration, Exhibit C.

On November 15, 1990, the Council issued its ruling in favor of Fischbach & Moore, finding no violation of the referral procedure promulgated in § 4 of the Inside Agreement. According to the Council, "inasmuch as Fischbach & Moore signed documents stating they were responsible for all of Corbin-Dykes' debts and responsibilities, the Union properly regarded them as one employer for the purposes of Referral Procedure." Cooper Declaration, Exhibit G.

Plaintiff did not participate in any of these proceedings. In response to the notification letter from the Local's counsel, plaintiff wrote that "[a]ll such matters will now be litigated before the district court, and not before any 'Committee' as represented in your letter." Moore Declaration, Exhibit B.

Throughout the arbitration process, plaintiff's position was purportedly asserted by the Local.

Plaintiff claims that he never filed a grievance against the Union or F & M. Factually, plaintiff's allegation is supported by the evidence before the court. Neither Fischbach & Moore nor any of the other defendants have produced any record of a grievance filed by plaintiff. In fact, the Declaration of Dick Smith states that "[t}he first notice that the Union had of Lawrence Moore and Walter Whelan's discriminatory dispatch issue was when I was served with the complaint in Case NO. 87-0172-B(M)." If Smith, as business manager of the Local, was unaware of any grievance filed by plaintiff, then the court infers that none was filed by plaintiff.

Regardless of whether plaintiff filed the grievance himself, Fischbach & Moore now claims that summary judgment is appropriate because the Inside Agreement states that arbitration is the sole and exclusive remedy for alleged violations of any section of that

Agreement and the decision of the arbitrator is final and binding on all parties. Cooper Declaration, Exhibit A (Copy of Inside Agreement), §§ 1.04-1.06.

Section 1.06 (A-2) of the Inside Agreement provides that "these provisions shall be the sole and exclusive remedy for any claims or alleged violation of any Section of this Agreement or any grievances arising pursuant to any of the provisions of this Agreement." The same section continues: "The final decision of the grievances resolution bodies [the Committee and the Council] shall be final and binding upon all parties hereto, including the employees employed by employers, pursuant to the provisions of this Agreement."[2]

In addition to its *res judicata* argument, Fischbach & Moore asserts that plaintiff's

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2 Section 1.06 (A-2) concludes by stating that any party who "initiates legal proceedings attacking . . . the final decision of an arbitration, appeals or appellate body established pursuant to this section. . . who is unsuccessful in such endeavor, shall pay the reasonable costs and attorney fees of the party prevailing in such action or litigation."

claim is barred by a six-month statute of limitations on breach of contract claims contained in 29 U.S.C. § 160(b). Since plaintiff's complaint was filed in February, 1987, all breaches occurring before July, 1986 allegedly are not actionable. Plaintiff responds that the applicable statute of limitations is four years.

In addition to opposing the motion on the merits, plaintiff alternatively argues that summary judgment would be premature at this time under Fed. R. Civ. Proc. 56(f). Plaintiff has also moved for sanctions.

DISCUSSION

I. Summary Judgment Standard

In order to prevail on a motion for summary judgment, the moving party must establish that no material fact is in "genuine dispute" such that a "reasonable jury could not return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Fuller v. Frank, 916 F.2d 558, 562 n. 6 (9th Cir. 1990).

II. Fischbach & Moore's Motion for Summary Judgment

A. The Finality Doctrine

As recognized by § 203 (d) of the Labor Management Relations Act ("LMRA") and the Supreme Court, arbitration provisions in collective bargaining agreements generally are final and district courts do not have the power to review the merits of arbitration rulings. See United States Steel Workers v. American Manufacturing Company, 363 U.S. 564 (1960); United States Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United States Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ("Steel Workers Trilogy"); A T & T Technologies v. Communications Workers, 475 U.S. 643, 648 (1985) (reaffirming Steel Workers Trilogy).

As described above, the evidence presented to the court suggests that plaintiff did not file a grievance attacking the hiring procedures of Fischbach & Moore. Fischbach & Moore argues that this is immaterial because

the Local and Fischbach & Moore properly brought the issue to the Committee under § 301 of the LMRA, since the question involved contract interpretation. According to Fischbach & Moore, grievances under the Inside Agreement are not initiated by individual members; rather, such grievances are initiated by the Local Union or the local National Electrical Contractors Association chapter. In whatever manner the arbitration process is initiated, it is asserted that the individual's lack of participation "does not affect the binding nature of the decision." See Mosely Declaration, para. 20.

If this case presented a typical union-employee-employer relationship, Fischbach & Moore's argument on this point would be persuasive. Because plaintiff, as a member of the Union, is a signatory to the Inside Agreement, it is clear that his participation is not necessary in order for the arbitrator to render a final, non-appealable decision on this issue.

However, where the union does not fairly represent the employee against the employer, the finality doctrine of Steel Workers Trilogy does not apply. Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1975). In Hines, union truck drivers were allegedly discharged without cause by their employer. Id., at 556-57. The union took the matter to the arbitration committee, but failed to competently investigate or present the drivers' defense. Id., at 559-60 n. 4. The discharge was upheld by the arbitration committee. Id., at 557-58. The district court dismissed the drivers' complaint because of the finality doctrine, Id., at 559, and the Court of Appeals affirmed. Id., at 560.

In reversing, the Supreme Court held:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Id., at 567. By so holding, the Court explicitly rejected the policy argument urged by the employer, who reasoned that "the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding." Id., See also Vaca v. Sipes, 386 U.S. 171, 186 (1967) (employer may not insist on exhaustion when union has breached its representation duty in processing grievance). This court recognizes the employer's policy argument in Hines as being identical to that asserted by Fischbach & Moore in this case.

The Ninth Circuit, in considering the finality doctrine where the union has unclean hands, has held:

> To us, it makes little difference whether the union subverts the arbitration process by refusing to proceed as in Vaca or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation.

Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

B. Finality in this Case

Fischbach & Moore's efforts to distinguish Hines and its progeny are unpersuasive. Fischbach & Moore argues that each of the cases cited above, as well as some others cited by plaintiff, involve suits against employers in which the employee is seeking to preserve "uniquely personal" rights encompassed by § 301. As examples of such rights, Fischbach & Moore notes that the Supreme Court in Hines mentioned wages, hours, overtime pay, and wrongful discharge.

In this case, Fischbach & Moore argues that plaintiff is asserting a mere contractual right under the Inside Agreement. Fischbach & Moore's position creates a distinction without a difference. Plaintiff is suing the employer for breach of the collective bargaining agreement. If plaintiff is improperly relegated to the out of work list because of Fischbach & Moore's conduct, then plaintiff's asserted right falls squarely within those contemplated by Hines, regardless of the

semantic labels Fischbach & Moore wishes to attach to that right.[3]

In order to avail himself of the protection afforded by Hines in resisting a motion for summary judgment, plaintiff must demonstrate that a genuine issue of material fact exists as to whether the union's breach of duty "seriously undermines the integrity of the arbitral process . . ." Hines, 424 U.S. at 567. The parties have focused on the impartiality of the Committee and the Council, without reference to the relationship between the Local and plaintiff. See Opposition Brief, pp. 7-13; Reply Brief, pp. 7-12. By so doing, Fischbach & Moore and plaintiff have ignored the crucial issue under Hines. The issue is not the

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3 If Fischbach & Moore's position were correct, then no remedy would exist for an employee unfairly represented by his or her union where the arbitration dispute involved "contractual" rights. Accepting Fischbach & Moore's position, this court would be forced to conclude that no matter how egregious the union's lack of representation, the "safety net" created by Hines would not be available simply because of the label attached to the right. This court declines to accept this reading of Hines.

partiality or corruptness of the Council and the Committee; rather,the issue is whether plaintiff, as a member of the Local allegedly injured by Fischbach & Moore's transfer practices, was fairly represented by the Local in the administrative process. If not, then the finality doctrine does not apply.

This court finds that a genuine issue of material fact exists as to whether a conflict of interest existed between plaintiff and the Local, such that the Local did not represent plaintiff's position fairly before the Committee and the Council. Specifically, the participation of the current Local business manager Tom Pridemore may have tainted the arbitration proceeding. Pridemore, who is a defendant in the present action, submitted a declaration to this court in support of Fischbach & Moore's earlier motion for summary judgment. In that declaration, Pridemore verified certain business records of Fischbach & Moore, and concluded: "Therefore, Fischbach & Moore, Inc. and Corbin-Dykes Electric are one

employer for the purposes of the hiring hall agreement." Cooper Declaration, Exhibit D (Pridemore Declaration contained therein).[4]

However, once this court ruled against Fischbach & Moore, and the arbitration process began, Pridemore became the Local's (and therefore plaintiff's) advocate in attacking the hiring practices of Fischbach & Moore. In the Labor-Management Committee hearing, Pridemore sat as a union representative, as did two other defendants in this case. More importantly, when the issue went to the Council, Pridemore signed the Local's brief and appeared for the Local at the hearing. Cooper Declaration, Exhibits E, G.

Given the history of this case, the court

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4 Fischbach & Moore attempts to limit the impact of this declaration by stating that it was purely an evidentiary vehicle, but did not "state any position either 'for' or 'against' Plaintiff Moore." This statement is incorrect. As noted above, Pridemore concluded in his declaration that F & M and Corbin-Dykes were one entity, a position which is directly contrary to Moore's claim in this lawsuit and the purported position of the Local in the arbitration process.

concludes that an issue of fact remains as to the Local's fulfillment of its duty of fair representation.[5] Accordingly, the Hines exception may apply to this case and preclude Fischbach & Moore from relying on the finality doctrine enunciated in Steel Workers Trilogy. Therefore, Fischbach & Moore's motion for summary judgment on this ground must be denied.

C. Statute of Limitations

Fischbach & Moore asserts in the alternative that a breach of contract claim against an employer must be brought within six months under 29 U.S.C. § 160(b). Plaintiff argues that the relevant statute of limitations

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5 The court takes judicial notice of the evidence received during the trial in Civil Case No. 85-1719-B. Accordingly, the court recognizes the long running dispute between plaintiff and the Local, a dispute which has now been before this court for more than five years. Although this court is not in a position to quantify the effect of this dispute on the ability of the Local to oppose Fischbach & Moore on plaintiff's behalf in an arbitration context, the court observes that the deterioration of the relationship between plaintiff and his union raises serious questions as to whether the finality doctrine should be imposed on plaintiff.

is four years, pursuant to California law. Both sides cite DelCostello v. Teamsters, 462 U.S. 151 (1983), in which the Court held that in the absence of an applicable federal statute of limitations, courts should apply the most closely analogous statute of limitations under state law. In DelCostello, the employee's suit sought to vacate an arbitration award, and the Court found that there was no closely analogous state statute of limitations. Id., at 166-68. Accordingly, the Court applied the six-month statute of limitations provided by § 10(b) of the National Labor Relations Act. Id., at 171. However, where the suit is for breach of the collective bargaining agreement against the employer, the Court applies the state statute of limitations for breach of contract. See Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966).

In this case, while an arbitration award is involved, plaintiff's cause of action against Fischbach & Moore, unlike the complaint in DelCostello, does not seek to vacate the

arbitration award. Rather, plaintiff is alleging violation of the collective bargaining agreement by the employer, as in Hoosier Cardinal. Therefore, the California breach of contract statute applies, and Fischbach & Moore's motion for summary judgment on this ground must be denied.

III. Discovery and Evidentiary Disputes

Because the court has reached its ruling based only upon the evidence and declarations cited in this memorandum opinion, the court need not reach the various evidentiary issues asserted by the parties. Moreover, plaintiff's argument under Rule 56(f) is moot since the motion for summary judgment has been denied on the record presently before the court.

IV. Sanctions

Plaintiff requests sanctions against counsel for Fischbach & Moore. No good cause appearing, the motion is denied.

IT IS SO ORDERED. DATED: March 19, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order affirming magistrate judge's order; bifurcating trial; granting in part and denying in part motion for summary judgment by defendant IBEW; granting in part and denying in part motion for summary judgment by defendant Local 569

May 2, 1991

The above captioned matter came on regularly for hearing on April 1, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); and Norman R. Allenby, Esq., and Dorothy J. Almour, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the supporting and opposing briefs, and the oral argument thereon, the court hereby enters the

following order.

I. Appeal from the Magistrate Judge's Order

The order of the Magistrate Judge requiring plaintiff to undergo a physical examination at the IBEW's expense is affirmed. The court finds that plaintiff's objections to the qualifications of the doctor selected by the IBEW are without merit. Likewise, the order of the Magistrate Judge denying the IBEW's request that plaintiff undergo a mental exam is affirmed.

II. Motion for Separate Trial by F & M

The court finds that the fifth cause of action against defendant F & M is sufficiently independent from plaintiff's other causes of action that bifurcation is warranted. Subject to change as future events may warrant,[1]

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1 The court notes that F & M has filed a motion for reconsideration of the order denying summary judgment in its favor, and a new motion for dismissal based upon plaintiff's alleged lack of standing. Concurrently, plaintiff is seeking leave to amend his third amended complaint (TAC) in order to expand the scope of his allegations against F & M.

the court will bifurcate the trial so that the fifth cause of action against F & M will proceed first before the jury, after which the jury shall return a verdict on that cause of action only, followed by the remainder of the case against Local 569 and the IBEW before the same jury.2

III. Motion for Summary Judgment by IBEW

A. First Cause of Action: Duty of Fair Representation

The IBEW argues that plaintiff can only bring this claim against Local 569, since the latter defendant is the exclusive bargaining representative of the union members. The law is clear that "[a]n international or regional affiliate of a local union may not be liable

2 The court recognizes the reciprocal impact the bifurcated trials may have on each other, e.t., if F & M's transfer policy does not constitute a breach of the Inside Agreement, then a fortiori the Local did not breach its duty of fair representation in failing to protect its members from said policy. Such impacts shall be managed by the court as they arise, and do not outweigh the prejudice which F & M will endure if the case is not bifurcated.

for the local's unfair labor practices merely by virtue of its affiliation with the local." Abreen Corp. v. Laborers' Int'l Union, 709 F.2d 748, 757 (1st Cir. 1983), cert. denied, 464 U.S. 1040 (1984). As the First Circuit has held in applying § 301 of the Labor Management Relations Act (LMRA):

> A plaintiff seeking to place liability on an international for a local's allegedly illegal conduct must further show that the local acted as the international's agent or that the international independently participated in the unlawful conduct.

Boroweic v. Local No. 1570, 889 F.2d 23, 26 (1st Cir. 1989) (citing Abreen, 709 F.2d at 757, and Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 213-17 (1979).

In response to the general rule, plaintiff posits two factual assertions: (1) the IBEW has a veto power over all local union contracts; and (2) the IBEW signed and ratified the Local's contract with Atkinson Mechanical Contractors (Atkinson).3

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3 The Atkinson Agreement was actually

Upon review of the Atkinson Agreement, the court finds that the IBEW's position is persuasive. The signature pages of the Atkinson Agreement reveal that only the Local Business Manager, defendant Paul Blackwood, signed the document. On that page, there is an IBEW stamp which states, "Portion agreed to and signed by LU 569 is hereby approved." This stamp of approval reflects the veto power exercised by the International.

In responding to the Barry Declaration, plaintiff has relied almost exclusively on conclusory allegations. Plaintiff has not supplied this court with any tangible evidence, e.g., deposition excerpts or documents, suggesting that the IBEW engaged in affirmative conduct or unreasonably meddled in the Local's affairs with respect to plaintiff and his fair representation claims.

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negotiated by Atkinson and the Imperial County Building and Construction Trades Council, AFL-CIO, with which the Local is affiliated. The contract involved work to be performed on the Ormesa Geothermal Project.

Based upon all of the above, the IBEW's motion for summary judgment on the first cause of action is granted.

B. Second Cause of Action: Prima Facie Tort, or Blacklisting, and Ninth Cause of Action: Intentional Infliction of Emotional Distress

The IBEW argues that jurisdiction over these tort claims is preempted by the exclusive jurisdiction of the National Labor Relations Board (NLRB). The IBEW is correct, as the preemptive effect of the NLRA is not altered by plaintiff's characterization of these allegations as state based causes of action. See Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.) ("Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge."), cert. denied, 439 U.S. 930 (1978).

In Magnuson, the court went on to hold that the complaint did not fit within "the narrow exception to federal preemption" explained in Farmer v. United Brotherhood of Carpenters & Joiners, Local 25, 430 U.S. 290

(1977). Magnuson, 576 F.2d at 1369. Preemption will not apply if the wrongful conduct is "a merely peripheral concern" of federal law, and affects interests which are "deeply rooted in local feelings and responsibility." Farmer, 430 U.S. 296 (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)). In Magnuson, the Ninth Circuit concluded, "Unlike Farmer, this action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." Magnuson, 576 f.2d at 1369 (emphasis supplied).

In this case, it is clear that plaintiff's allegations are based on a "matrix of facts" which are "inextricably intertwined" with the NLRA. The Farmer exception is "narrow" and was not "a signal that these causes of action for infliction of emotional distress were generally exempted from preemption." Id. Plaintiff will not be permitted to use artful pleading to avoid preemption. Therefore, the IBEW's motion

for summary judgment on the second and ninth causes of action is granted.

C. Third Cause of Action: Violations of § 101 of the Labor-Management Reporting and Disclosure Act (LMRDA)

1. Direct Restrictions Imposed by the IBEW on the Democratic Process

Plaintiff alleges LMRDA violations based upon an IBEW rule which prevented him from running for IBEW convention delegate in 1986. Complaint, para. 175. Under Titles I and IV of the LMRDA, a union may adopt reasonable rules relating to the nominating and elective process. Steel Workers v. Sadlowski, 457 U.S. 102, 111 (1982). However, where an eligibility rule has a "large" undemocratic effect, the rule must serve a valid union interest. Doyle v. Brock, 821 F.2d 778, 785 (D.C.Cir. 1987) (citing Local 3489, United Steelworkers v. Usery, 429 U.S. 305, 310 (1977)).

Plaintiff's application of Doyle and Usery to this case is strained. In those two cases, the court invalidated eligibility provisions which required that candidates attend fifty

percent of union meetings over the last year (Doyle) or three years (Usery). In Doyle, the court noted that both provisions "rendered 97% of the membership ineligible to run for office." Doyle, 821 F.2d at 783 (emphasis supplied).

Because plaintiff falls far short of the anti-democratic showing made in the cases upon which he relies, the deferential standard of Sadlowski applies. Plaintiff has not created a genuine issue of material fact as to the reasonableness of the policy. Therefore, summary judgment is granted to the IBEW as to this portion of the third cause of action.

2. IBEW Liability for Undemocratic Acts of the Local; Agency under the LMRDA

In order to hold the IBEW liable for the misconduct of the Local defendants, plaintiff must demonstrate that the IBEW ratified the Local's conduct. Rodonich v. House Wreckers Union Local 95, 817 F.2d 967, 973-74 (2nd Cir. 1987). In Rodonich, the Second Circuit held that "ratification would occur if [the international] affirmed the discipline imposed

on plaintiffs with full knowledge that it was part of an overall scheme to suppress dissent in violation of the LMRDA." Id. at 974. The court concluded that ratification did not occur, even though the International affirmed the decisions of the Local trial board against plaintiffs. Id.

Under Rodonich, plaintiff has not created a genuine issue of material fact with respect to ratification.[4] Therefore, to the extent plaintiff's LMRDA claims seek to impose broad agency liability on the IBEW, the motion for summary judgment on the third cause of action is granted.

3. Building Trades Assessment

The IBEW asserts that count 5 is moot because the alleged violation was corrected by

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4 Plaintiff's citation to Aguirre v. Automotive Teamsters, 633 F.2d 168, 170 (9th Cir. 1980) is unpersuasive, as that decision considered agency principles with respect to union officers and the local union, not the local and the International. Although the International was also a defendant in Aguirre, the discussion does not implicate the concept of local-international agency.

a second ballot which was secret, and because plaintiff received a refund of the amount that Local No. 569 improperly collected from him. See McCann Declaration, Attachments 6, 16.

However, plaintiff makes credible allegations that the purportedly corrective vote was also taken in violation of the LMRDA. Specifically, plaintiff alleges: (1) there were not two readings at two separate union meetings as required by Local 569's bylaws and the notice requirements of the LMRDA; (2) there was no mention of any retroactive effect; and (3) non-affected members voted. Moore Declaration, para. 15.

Because plaintiff's allegations raise genuine issues of material fact as to the validity of the second vote and the IBEW's role in its administration, the motion for summary judgment on count five of the third cause of action is denied. Accordingly, count five constitutes the only surviving allegation of the third cause of action against the IBEW.

D. Seventh Cause of Action: Breach of Contract

This court has jurisdiction under § 301(a) of the LMRA over a suit brought by a union member against an international union for violation of the union constitution. Kinney v. Int'l Brotherhood of Elec. Workers, 669 F.2d 1222, 1229 (9th Cir. 1982). The individual IBEW defendants argue that no provision of the IBEW Constitution creates contractual liability. Plaintiff cites Article XXII, Section 3, and Article XXVII, Section 1, of the IBEW Constitution. See Complaint, para. 231. The court finds that triable issues of fact remain as to the liability of the individual IBEW defendants under the relevant articles, and the vicarious liability of the IBEW for the conduct of those individual defendants.5

5 The IBEW's reliance on Teamsters Local 420 v. Traweek, 867 F.2d 500, 508, is misplaced. In Traweek the Ninth Circuit only considered a suit against two non-officer members, where the plaintiffs eschewed the internal grievance process. In finding that the district court did not have subject matter jurisdiction, the court in Traweek did not foreclose suits for declaratory relief against union officers in their official capacities, as in this case.

E. Eighth Cause of Action: Violation of § 609 of LMRDA

Section 609 of the LMRDA states that it shall be unlawful for any labor organization "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter." The phrase "otherwise discipline" refers "only to actions 'undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership.'" Breininger v. Sheet Metal Workers Intern., 110 S.Ct. 424, 439 (1989) (quoting Miller v. Holden, 535 F.2d 912, 915 (5th Cir. 1076)).

In this case, the IBEW asserts that plaintiff is only charging individual retaliation, as opposed to the improper use of the union's formal discipline machinery. However, plaintiff's eighth cause of action does not refer to ad hoc retaliation, but instead to official conduct which led to his suspension and expulsion. TAC, para 249.

Therefore, the motion for summary judgment on the eighth cause of action is denied.

IV. Local 569's Motion for Summary Judgment

A. First Cause of Action: Duty of Fair Representation

1. Count 1: The Hiring Hall

In count 1, plaintiff charges a variety of breaches of the duty of fair representation which relate to Local 569's administration of the hiring hall.

a. Short Call Abuse

Local 569 alleges that this claim is barred by the six month statute of limitations applicable to fair representation claims, as contained in § 10(b) of the LMRDA. See Conley v. IBEW Local 639, 810 F.2d 913, 915 (9th Cir. 1987) (applying six month statute to fair representation claims involving hiring hall). Since plaintiff filed his only charge on this issue with the NLRB in June, 1985, defendants posit that the claim accrued well before the complaint was filed in February, 1987.

However, plaintiff raises a triable issue

of material fact with respect to Local 569's alleged continuing wrongful administration of the out-of-work list (List). See Moore Declaration, para. 25, 26. Although plaintiff filed one formal complaint in June, 1985 on this issue, that fact alone does not signify necessarily that the conduct itself ceased. Accordingly, the short call charges are not time barred.

b. Removal of Plaintiff from the List in May, 1987

Defendants argue that plaintiff's removal was performed with reference to objective, non-discriminatory criteria. Smith Declaration, para. 22 (removal on this basis not unusual); Exhibit I (removal of Conrad Mollar for same reason). Moreover, defendants note that plaintiff himself had previously filed charges against other members in which he alleged double-booking, and thus was aware of the Local's prohibition against the practice.

In his Declaration, plaintiff states, "I know that it is the practice all over the country for union electricians to maintain

their position on their home out of work lists while working out of town." Moore Declaration, para. 24. In light of this declaration, the court finds that the removal of one other electrician does not prove that the policy was uniformly applied. Because the declarations are in direct conflict, there is a genuine issue of material fact as to whether this policy uniformly existed at the time plaintiff was removed, and summary judgment is inappropriate on these charges.

c. Required Registration in Group II in May or June, 1987

By his Declaration, plaintiff has established an issue of material fact as to whether this relegation was retaliatory and based upon his practice of printing individual defendants' salaries and expense accounts in his dissident union newsletter.

d. Transfer of George England

Local 569 asserts that an electrician may be transferred from one employer to another, without going back on the List, if the electrician possesses "special skills" and the

Local approves the transfer. According to the Local, England had detailed knowledge of the work being performed at Berg Electric, and thus had the "special skills" required for a transfer when the work being performed at Berg was moved to Chula Vista Electric by the general contractor.

However, the Tarleton Declaration indicates that Tom Tarleton worked on the Chula Vista job with England, and [t]hė job was ordinary electrical work and required no special skills." Tarleton Declaration, para. 8. Accordingly, a genuine issue of fact exists as to the alleged "back-dooring" of England.

e. Sound Book Claim

Plaintiff recovered $43,156.31 in damages in the first trial, as the jury found that the Local breached its duty of fair representation by failing to notify plaintiff that he could remain on the List while working under the Sound Agreement. The doctrine of claim preclusion bars all grounds for recovery which could have been asserted, whether they were or

not, in a prior suit between the same parties on the same cause of action. McClain v. Apodaca, 793 F.2d 1031 (9th Cir. 1986).

Plaintiff's response to this argument is unpersuasive. Plaintiff offers no authority suggesting that disappointment with the size of a jury's verdict allows a claim to be brought against the same defendant twice. Accordingly, summary judgment should be granted on the sound book claim.

Based upon all of the above, the Local's motion for summary judgment on count one is denied except with respect to the sound book claim, upon which summary judgment is granted.

2. Counts 2 and 3: Grievance Against Atkinson

In resisting summary judgment on these counts, plaintiff relies on his allegations of collusion between Atkinson and the Local. Moore Declaration, para. 8, 9, and 10. Most importantly, plaintiff has provided telephone records which show that Richard White was communicating with the Local while plaintiff was driving to the Atkinson job site in the

Imperial Valley. While defendants portray these calls as "routine," their existence, coupled with the deposition testimony cited by plaintiff in para. 9 and 10 of his declaration, establish facts upon which a reasonable jury could base a verdict in plaintiff's favor. Accordingly, summary judgment is denied on counts two and three.

3. Count 4: Ratification of Collective Bargaining Agreements

In the context of the collective bargaining process, the duty of fair representation is breached only if the disputed union procedures are wholly irrational or arbitrary. Airline Pilots Association v. O'Neill, ___ U.S. ___, 91 DAR 3211, 3214 (March 19, 1991). According to Local 569, since the mail ballot was conducted in accordance with the IBEW Constitution and for a legitimate union interest, this claim must be dismissed as a matter of law. However, plaintiff's countervailing evidence establishes sufficient irregularity to create a genuine issue of material fact. Moore Declaration, para. 27

(ruling by Robbins concerning return addresses).

With respect to plaintiff's charges concerning the 1987 amendment to the prior Agreement, there is also a triable issue of fact. Even if Barry properly delegated the authority to implement the amendment, the court is not convinced that the delegates exercised it properly. Accordingly, the motion for summary judgment on count 4 is denied.

4. Count 5: Derogation of Work Status

This count refers to plaintiff's most recent derogation, when defendant Pridemore put him on Group II after he re-signed the List in January, 1990. Plaintiff has raised an issue of fact as to whether the assignment to Group II was retaliatory. Most importantly, plaintiff alleges that he did not have the requisite experience for Group I because he had been kept out of work by defendants' allegedly discriminatory practices in the last four years. Therefore, Local 569's motion for summary judgment on count 5 is denied.

5. Count 6: F & M's Transfer Policy

Plaintiff originally complained about F & M's transfer policy on March 1, 1988. Defendants assert that under the six month statute of limitations, plaintiff's complaint can only reach back to October 1, 1987. Therefore, defendants argue that plaintiff must show damage between October 1, 1987, and the cessation of the transfer policy, which he cannot do because he was not even on the List during this period.

At the hearing, the court requested additional factual briefing on the standing issue, and this aspect of the Local's motion for summary judgment is accordingly taken under submission.[6]

B. Second Cause of Action: Prima Facie Tort, or Blacklisting, and Ninth Circuit Cause of Action: Intentional Infliction of Emotional Distress

Like the IBEW, the Local defendants argue

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6 The standing issue is also the basis of a new motion to dismiss filed by F & M. See supra n.1.

that these claims are preempted by the LMRA. However, while the IBEW claimed preemption under § 10(a) of the LMRA, the Local is asserting preemption under § 301 of the LMRA, which is appropriate as Local 569 is a signatory to the collective bargaining agreement at issue.

Under Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-13 (1985), § 301 preempts any state claims which could only be resolved by reference to a collective bargaining agreement. Where the terms of a collective bargaining agreement govern job security or employment opportunities, any state tort claim intertwined with those provisions is preempted. Jackson v. Southern California Gas Co., 881 F.2d 638, 643 (9th Cir. 1989). This circuit has recently held that the preemptive effect of § 301 is negated only when the right asserted would exist even in the absence of a collective bargaining agreement, e.g., "[t]he nonnegotiable right not to be discharged for filing a workers' compensation [claim] . . .." Eldridge v. Felec

Services, Inc., 920 F.2d 1434, 1438 (9th Cir. 1990).

Under this authority, plaintiff must establish that his claims in the second and ninth causes of action are wholly unrelated to the collective bargaining agreement (Agreement).7 Clearly, each one of plaintiff's allegations relate in some way to the Agreement and the defendants' administration and alleged manipulation of said Agreement. The allegations of blacklisting and emotional distress all have their genesis in improper conduct under the Agreement. Therefore, these claims are preempted.8

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7 Plaintiff's alternative argument, that his blacklisting tort claim may be considered improper "discipline" under the LMRDA, is foreclosed by Breininger, 110 S.Ct. at 440 (informal "blacklisting" and other ad hoc practices do not constitute "discipline" under the LMRDA).

8 Plaintiff is unpersuasive in his discussion of pendent jurisdiction, which does not apply where claims are preempted. Plaintiff's citation to Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993, 999 (9th Cir. 1987), is taken out of context, as the court's decision considered pendent jurisdiction over tort claims in the § 301 context only insofar as

Where claims are preempted by § 310, they must be dismissed unless plaintiff has exhausted his contractual grievance. procedures. Jackson, 881 F.2d at 646. However, the employee "may obtain judicial review of his claim despite his failure to exhaust contractual remedies if he can show that the union breached its duty of fair representation." Id. (citing Vaca v. Sipes, 386 U.S. 171, 185-86 (1967)). Here, there is a genuine issue of material fact as to whether Local 569 breached this duty. See supra pp. 10-15. Therefore, although these claims are preempted by § 301, preemption does not prevent this court from hearing plaintiff's claims. Accordingly, Local 569's motion for summary judgment is denied on the second and ninth causes of action.9

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removal was concerned. Indeed, among the rationale supporting the exercise of pendent jurisdiction was "the significant federal interest in deciding the preemption defense." Id. (emphasis supplied).

9 The court finds that this holding is not inconsistent with the court's holding on the

C. Third Cause of Action: LMRDA Violations

1. Counts 1 and 2: Delegate Election and Publication of Attacks in Newsletter

Local 569 is entitled to summary judgment on the delegate election issue because the rule preventing a member from running for delegate and business manager at the same time is not unreasonable. See supra p. 6. Moreover, with respect to the newsletter claim, there is no right created by statute or otherwise providing a right of rebuttal in union publications. Even if the disputed articles amounted to campaign literature financed by the incumbent regime, this allegation does not suggest that plaintiff was prevented from independently responding, but merely that plaintiff was not

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IBEW's motion for summary judgment on the second and ninth causes of action, as the latter ruling did not implicate the duty of fair representation owed by the Local. Indeed, the court held that the IBEW is not under a duty of fair representation to plaintiff. See supra pp. 3-4. With respect to the IBEW, plaintiff's preempted claims are within the exclusive jurisdiction of the NLRB under § 10(a), and plaintiff has not made any allegations suggesting that his pursuit of grievances under § 10(a) would be futile.

provided free rebuttal space. Accordingly, summary judgment is granted on the delegate election and newsletter claims contained in counts 1 and 2. TAC, para. 175, 176, 184, 185.

2. Count 3: Right to Sue

Despite defendants' characterization of count three as implicating the validity of the 1986 and 1989 elections, the complaint indicates that plaintiff is attempting to vindicate his right to sue. See para. 190, 193. Plaintiff is seeking damages under Title I based upon the alleged infringement of his right to sue, and triable issues of fact remain on that claim. Accordingly, the motion for summary judgment on count 3 is denied.

3. Count 4: Wrongful Discipline

Plaintiff alleges that he was unfairly disciplined by the trial boards convened in January, 1987, November, 1987, and March, 1990. With respect to the first two proceedings, plaintiff's opposition amounts to nothing more than a repeat of his defense to the charges

brought by Charles Morrison. Even assuming that plaintiff was innocent, however, plaintiff has failed to create an issue of fact as to whether the conduct of the trial boards violated his LMRDA Title I rights. It is not for this court to determine the validity of the outcome, but merely whether the outcome was tainted by the procedures used, and whether there was some evidence for the outcome.

In seeking summary judgment of the allegations based upon the March 5, 1990 trial board, defendants contend that plaintiff failed to exhaust his internal appeals. Plaintiff admits that he did not appeal to the IBEW, but argues futility. There is at least a triable issue of fact as to whether an appeal at this stage would have been futile. Accordingly, summary judgment is granted on count 4 only with respect to the first two trial boards.

4. Count 5: Building Trades Assessment

Because plaintiff makes credible allegations concerning the votes taken on this assessment, summary judgment is denied on count

5. See supra pp. 7-8.

D. Fourth Cause of Action: Breach of Fiduciary Duty

Plaintiff has alleged financial improprieties concerning a car auction, paid vacations for union officers, and pension contributions. Local 569's contrary assertions merely join the issues, and do not resolve all issues of material fact. Accordingly, the motion for summary judgment on the fourth cause of action is denied.

E. Sixth Cause of Action: Assault

Again, the dispute between the parties is merely factual. Although Local 569 has submitted declarations assailing plaintiff's allegations, plaintiff has answered with his own submissions. See Moore Declaration, para. 30, 31; Rodman Declaration, para. 6 (threats); Williamson Declaration, para. 7 (Degener pointed gun at plaintiff). While Local 569 is correct in asserting that mere words do not constitute assault, plaintiff has demonstrated that there is an issue of fact as to whether he at least reasonably believed that he was about

to suffer bodily injury, as required by California law. Therefore, summary judgment on the sixth cause of action is denied.

F. Seventh Cause of Action: Breach of Contract versus Individual Union Officers

The court in Traweek did not foreclose suits under § 301 for injunctive and declaratory relief against union officers in their official capacities. See supra n. 5 and accompanying text. Accordingly, the motion for summary judgment on the seventh cause of action is denied.

IT IS SO ORDERED DATED May 2, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order dismissing plaintiff's objection to order of magistrate judge; denying plaintiff's motion to amend and for class certification; granting defendants' motion for protective order; dismissing plaintiff's notice of default of J.J. Barry; denying defendant Fischbach & Moore's motion for reconsideration; granting in part and denying in part defendant Fischbach & Moore's motion to dismiss.

June 5, 1991

The above captioned matter came on regularly for hearing on May 28, 1991, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of Electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., and Jennifer T. Messersmith, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M); and John C. Nangle,

Esq., appeared for the Department of Labor. Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

I. Plaintiff's Objection to Order of Magistrate Judge

Plaintiff's objection to the order of the Magistrate Judge quashing the subpoena served on the Department of Labor's motion for a protective order, is hereby dismissed. Plaintiff concedes that at the time of the motion before the Magistrate Judge he had not complied with the appropriate regulations. If plaintiff alleges that he has now complied with the regulations, but is still being refused discovery, his proper remedy is a motion to compel before the Magistrate Judge.

II. Plaintiff's Motion to Amend and for Class Certification

Under Fed. R. Civ. Proc. 15, leave to amend "shall be freely given when justice so requires." In deciding whether an amended

complaint should be allowed, this court considers four factors: (1) undue delay; (2) bad faith of the moving party; (3) futility of the amendment; and (4) prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). While all of the factors mitigate against allowing the proposed amendments, the first and fourth factors are particularly compelling on the facts of this four year old case, in which plaintiff has already amended three times. Accordingly, the motion to amend the third amended complaint is hereby denied.

Under Fed. R. Civ. Proc. 23, plaintiff has not met his burden in seeking class certification. Plaintiff has not demonstrated (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Accordingly, the motion for class certification is hereby denied.

III. Defendants' Motion for Protective Order

The notices served by plaintiff on

defendants' counsel are not sufficient to compel the attendance of the parties named therein. In order to compel the attendance of witnesses at trial, plaintiff must comply with Fed. R. Civ. Proc. 45(e)(1), and all other appropriate rules. Where necessary, plaintiff must obtain and use deposition testimony of those witnesses beyond the subpoena power of this court.

IV. Plaintiff's Notice of Default of J.J. Barry

By order entered July 5, 1989, this court dismissed the second amended complaint against defendant J.J. Barry for lack of personal jurisdiction. In so doing, the court did not differentiate between the various causes of action asserted against Barry, but rather ruled globally with respect to all allegations against Barry in the second amended complaint. Because this court lacks personal jurisdiction over Barry, the notice of default filed by plaintiff against Barry is dismissed.

V. F & M's Motion for Reconsideration

By order entered March 26, 1991, this court denied F & M's motion for summary judgment, primarily on the ground that the "finality" doctrine generally applicable to arbitration decisions does not apply in this case. See Order, March 26, 1991, pp. 2-11. In that order, the court also denied the statute of limitations defense asserted by F & M, finding that the period applicable to a breach of contract claim against the employer is four years. In so doing, the court relied primarily on Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966) (where employer breaches collective bargaining agreement, state statute of limitations for breach of contract applies). Cf. DelCostello v. Teamsters, 462 U.S. 151, 161 (1983) (six month statute provided by § 10(b) of the National Labor Relations Act applies).

F & M's motion for reconsideration is based upon Conley v. Int's Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987), where the court considered the interplay

between Hoosier Cardinal and DelCostello in cases where a plaintiff sues both the employer and his or her union. The Ninth Circuit concluded that in such "hybrid" cases the six-month statute of limitations provided by § 10(b) should apply.

Under Conley, plaintiff's claim is clearly a hybrid action. Therefore, contrary to the court's earlier ruling, Conley requires an application of the six-month statute of limitations to plaintiff's claim against F & M. Thus, the only question on reconsideration is whether application of the six-month period is fatal to plaintiff's claim against F & M. In a letter dated March 1, 1988, plaintiff states that he "just learned" of F & M's transfer policy. Almour Declaration, Exh. B. Plaintiff's first amended complaint, filed on September 29, 1988, names F & M as a defendant for the first time. Therefore, F & M argues that the claim is time-barred.

However, F & M fails to note that plaintiff filed his motion to amend on May 13,

1988, as reflected in the court docket. Moreover, the official court file contains a lodged copy of plaintiff's first amended complaint, also dated May 13, 1988, which for the first time names F & M as a defendant because of its transfer policy. Therefore, even under the six-month statute of limitations, plaintiff's claim against F & M is not time-barred.[1] Accordingly, the motion for reconsideration is denied, except insofar as the court will apply the six-month statute of limitations to plaintiff's hybrid claims.

VI. F & M's Motion to Dismiss for Lack of Standing

On April 1, 1991, this court requested additional briefing on the issue of plaintiff's standing to sue F & M. Plaintiff was

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1 F & M also notes that plaintiff, by letter dated November 11, 1987, complained about the transfer of certain employees from F & M to Dynalectric. However, this charge reflects plaintiff's dissatisfaction with an isolated transfer, and does not suggest knowledge or notice of the transfer policy of F & M as is related to Corbin-Dykes. It is that policy which forms the basis of the fifth cause of action.

terminated from F & M on May 8, 1986, and was returned to the out-of-work list (List). On May 4, 1987, plaintiff's name was removed from the List, allegedly because he was "double-booking," i.e., working in another district while maintaining his position on Local 569's List. From the date of his removal, plaintiff lacks standing to assert his breach of contract claim against F & M, as plaintiff was not available for hiring after his removal from the List. While that removal may constitute a breach by the Local of its duty of fair representation, see Order, May 2, 1991, pp. 10-11, it was not accomplished with the complicity of F & M. Accordingly, F & M cannot be held accountable for breach of contract after May 4, 1987.

With respect to the period between May 8, 1986, and may 4, 1987, the evidence presented to the court indicates that plaintiff was on the List in a position where he was eligible to accept calls on those dates when F & M transferred to Corbin-Dykes. See Almour

Declaration, Exh. C; Pridemore Declaration, Exh. A; Brownfield Declaration, Exh. A. However, on each of the relevant dates plaintiff passed on calls which were made available to him by other employers. Almour Declaration, Exh. A. From this evidentiary fact, F & M concludes that plaintiff would also have rejected any calls to work for Corbin-Dykes, had such calls been made.

The court declines to accept this interpretation. Plaintiff's reluctance to accept some calls, or even all calls, does not necessarily mean that he would have passed on a call from Corbin-Dykes during the relevant time frame. Accordingly, the motion to dismiss is denied with respect to the period between May 8, 1986 and May 4, 1987.

IT IS SO ORDERED. DATED: June 5, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Order re motions for reconsideration and motions in limine.

July 16, 1991

The above captioned matter came on for hearing on June 6-7, and June 11, before the Honorable Rudi M. Brewster. Plaintiff Lawrence Moore appeared in propria persona; Lewis N. Levy, Esq., appeared on behalf of defendant Local 569 of the International Brotherhood of electrical Workers and the individual Local defendants (Local 569); Terry R. Yellig, Esq., appeared on behalf of defendant International Brotherhood of Electrical Workers and the individual International defendants (IBEW); Oscar F. Irwin, Esq., and Craig A. Brown, Esq., appeared on behalf of defendant Fischbach & Moore (F & M). Upon consideration of the various motions filed, and the oral argument thereon, the court hereby enters the following order.

I. Plaintiff's Motion for Reconsideration

Plaintiff's motion for reconsideration amounts to nothing more than reargument of issues already passed upon by this court. Because the court finds no good cause for reconsidering its previous rulings granting partial summary judgment to the IBEW and the Local, plaintiff's motion is hereby denied in its entirety.

II. IBEW's Motion for Reconsideration

A. Third Cause of Action, Count 5: LMRDA Violations (Building Trades Assessment and Proposed Bylaw Amendments)

In count 5 of the third cause of action, plaintiff alleges irregularities in the voting procedures used to ratify a building trades assessment against the members. Moreover, plaintiff alleges in count 5 that he was unlawfully prevented from presenting and supporting five proposed bylaw amendments to the membership. The court previously granted summary judgment to the IBEW on all counts of plaintiff's third cause of action except for

count 5. See Order, May 2, 1991, pp. 6-8.

With respect to the increase in the building trades assessment, the court is now convinced that plaintiff does not state a cause of action under the LMRDA for this alleged violation. While the IBEW concedes that the second, purportedly corrective vote on the increase was ordered by IBEW Vice-President McCann and IBEW Representative Robbins, the court finds that the allegedly unlawful procedures employed in conducting said vote were created, directed, and administered by Local officials.

In conformance with this court's earlier rulings, see Id. at p. 7, this court will not impose broad agency liability on the IBEW. Plaintiff has offered no credible evidence suggesting ratification by the IBEW of the Local's allegedly unlawful administration of the second vote. Accordingly, summary judgment is granted to the IBEW on the building trades assessment element of count 5 of the third cause of action.

Similarly, the court is also satisfied that summary judgment is appropriate with respect to plaintiff's allegations concerning the IBEW's role in consideration of his five proposed bylaw amendments. First, although plaintiff was initially prevented from reading the proposed bylaw amendments at two membership meetings, it is undisputed that IBEW President Barry personally remedied this conduct by directing IBEW Vice-President McCann to order Local 569 to permit the proposed amendments to be lawfully considered by the membership, and three were passed.1 Accordingly, the court finds that this episode does not provide a cause of action against the IBEW under the LMRDA.

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1 The court recognizes that by the time the proposed amendments were considered, plaintiff had been suspended from the Local based upon unrelated internal union charges. However, the court is unaware of any authority suggesting that a union member has a personal right to champion or sponsor a proposed bylaw amendment which is otherwise lawfully considered, voted upon, and passed. The court reserves comment on the issue which would arise if plaintiff's suspension had simultaneously caused the removal of his proposed amendments from any consideration whatsoever by the membership.

Second, only one of the three bylaw amendments passed by the membership involved dues, thereby potentially implicating § 101(a)(3) of the LMRDA. Specifically, the subject amendment provided for a decrease of the IBEW's percapita tax, and was vetoed by IBEW President Barry pursuant to his authority under the IBEW Constitution. Based upon the IBEW's citation to the legislative history, and plaintiff having failed to provide any contrary authority, this court concludes that § 101(a)(3) applies only to dues increases unilaterally imposed by union officials. Here, by contrast, plaintiff's complaint focuses on Barry's veto of a dues decrease. In other words, Barry's veto protected the present dues structure, as opposed to forcing an increase on the members. Therefore, the court concludes that summary judgment should be granted in the IBEW's favor with respect to this veto. Third, the veto by IBEW President Barry of the remaining two bylaw amendments was not unreasonable and was within

his authority under the IBEW Constitution.[2] Accordingly, summary judgment is granted to the IBEW on any claims arising from Barry's veto of these two amendments.

B. Seventh Cause of Action: Breach of Contract

As discussed above, any alleged improprieties associated with the second vote on the building trades assessment do not implicate the IBEW. Moreover, IBEW President Barry acted within his constitutional authority in refusing to approve the three bylaw amendments proposed by plaintiff and approved by the membership. Accordingly, these allegations do not give rise to a cause of action for breach of the IBEW Constitution.

However, summary judgment is not appropriate with respect to the IBEW's alleged failure to "pass upon and determine" plaintiff's charges against Local officers.

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2 These amendments involved vacation time for certain union officers and written notice for union meetings in which collective bargaining agreement proposals would be discussed.

See IBEW Constitution, Art. 27, § 9. If the court were to accept the narrow interpretation of this section offered by the IBEW, then the IBEW would enjoy de facto sovereign immunity for any and all action it takes, or refuses to take, in responding to a union member's charge, no matter how egregious such action or inaction may be.[3] The plain language of Article 27 requires the court reject this interpretation. Instead, plaintiff shall be permitted to attempt to prove to the jury that the IBEW breached its own Constitution by refusing to investigate and consider his charges in good faith.[4]

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3 Reducing the argument to its most obvious hypothetical level, the IBEW would have the court believe that no actionable breach of contract would occur if the International Vice-President, in the course of fulfilling his duties under Article 27, § 9, conducted a completely fraudulent investigation of a member's charges against a local officer. The court simply cannot accept this result.

4 If plaintiff can demonstrate collusion between the IBEW and the Local with respect to his internal charges, then those facts may give rise to additional causes of action against the IBEW.

C. Eighth Cause of Action: Violation of § 609 of the LMRDA

Upon reconsideration of the facts surrounding this cause of action as it relates to the IBEW, the court concludes that summary judgment should have been granted in the IBEW's favor. To the extent plaintiff alleges discipline of the type recognized under Breininger v. Sheetmetal Workers, 110 S.Ct. 424 (1989), this cause of action lies against the Local, not the IBEW.

Based upon all of the above, plaintiff shall proceed to trial against the IBEW on the seventh cause of action only, as more specifically described above.

III. Statute of Limitations on Breach of Contract Claim

The court has previously ruled that it would apply a six-month statute of limitations to plaintiff's breach of contract claim against F & M. See Order, June 5, 1991, p. 4 (citing Conley v. Int'l Brotherhood of Electrical Workers, 810 F.2d 913 (9th Cir. 1987)). The

court concludes that this time bar applies only to plaintiff's filing of the complaint after discovery of the wrongful conduct. In other words, the six month period runs forward from the date of discovery, preventing unjust delay once a plaintiff discovers a claim.5

Contrary to the assertions of defendants, however, the six-month period does not also reach back from the date of discovery, thereby limiting a plaintiff to six months worth of damages. If defendants' position were correct, then a completely reasonable and justified failure to discover a contractual breach would bar a plaintiff from recovering his lawful damages for more than a six-month period in all cases. This is clearly not the state of the law. Rather, a plaintiff who satisfies the statute with respect to the filing of the complaint is not barred by the same statute from reaching back to sue for breaches which occurred more than six months prior to

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5 The court has already ruled that plaintiff filed his complaint in a timely fashion. Order, June 5, 1991, pp. 4-5.

discovery.

IV. Local 569's Motions in Limine

A. Reference to 1986 and 1989 Elections

Because the propriety of these elections has already been litigated, plaintiff is precluded from attacking their validity in this trial. Plaintiff shall not refer to these elections as tainted, illegal, or otherwise improper. This court considers Judge Enright's prior orders, which certified the results of the 1986 and 1989 elections, as final judgments barring plaintiff from attacking the validity of said elections.

B. Reference to Disposition of Civil No. 85-1719-B

Plaintiff shall not refer to the verdict or jury award in Civil No. 85-1719-B, except insofar as plaintiff is prosecuting a cause of action against the Local based upon alleged retaliation against him due to said verdict and award.

C. Medical Exam

The results of the medical test conducted

by defendants' physician shall be admissible with respect to plaintiff's claims for emotional distress, assuming all evidentiary requirements are met.

D. References to January, 1987 and November, 1987 Trial Boards

Because the court has previously granted the Local summary judgment with respect to these trial boards, plaintiff shall not refer to them as tainted or otherwise unlawful.

E. Practices of Other Local Unions

Evidence concerning the practices and conduct of other local unions shall be inadmissible under Fed. R. Ev. 404(b).

V. Fischbach & Moore's Motions in Limine

With respect to plaintiff's claim for breach of the Inside Agreement against F & M, plaintiff shall not comment on any alleged collusion between the IBEW and/or Local defendants and F & M. In addition, plaintiff shall not comment on the debarment of F & M from any federal contract work. Even assuming arguendo that plaintiff's theories concerning

motive are correct, the fact remains that motive is not an element of a breach of contract claim against an employer. The court intends this prohibition to be broad in its reach, and plaintiff is urged to refrain from attempting to devise clever or subtle mechanisms designed to place any such evidence or commentary before the jury.

VI. Plaintiff's Motions in Limine

Plaintiff's motions in limine are denied without prejudice to the extent they become relevant during trial. The court i ruling in this manner because it cannot infer from plaintiff's conclusory arguments any valid reason for excluding any of the subject evidence.

VIII. General In Limine Rulings

In response to certain general evidentiary and procedural matters raised by the parties and not discussed above, the court hereby enters the following rulings: (1) the court

shall conduct all voir dire; (2) evidentiary disputes arising out of alleged discovery failures or witness list omissions shall be handled on an objection by objection basis, but time charges shall be imposed against the losing party; (3) events which occurred after July, 1985 and were not litigated in the first trial shall be admissible in this trial to the extent they are otherwise relevant.

IT IS SO ORDERED. DATED: July 16, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ORDER DENYING FISCHBACH & MOORE'S MOTION FOR SUMMARY JUDGMENT

Nunc Pro Tunc to July 19, 1991

Filed August 7, 1991

After three days of trial in the above captioned matter, the evidence presented by plaintiff indicated that the cause of action against defendant Fischbach & Moore (F & M) may be vulnerable to summary adjudication pursuant to Bowen v. United States Postal Service, 459, U.S. 212 (1983). Upon consideration of this proposition, and the oral argument thereon, the court orally granted summary judgment in favor of F & M. However, upon further consideration of the issue, the court hereby rescinds its oral ruling and denies F & M's motion for summary judgment.

In Bowen, plaintiff Bowen was terminated from his position with the United States Postal Service (Service) after an altercation with another employee. Id. at 214. Although Bowen

filed a grievance with his union contesting his termination, the union declined to take his grievance to arbitration. Id. Now dissatisfied both with his employer and his union, Bowen filed suit in district court alleging unlawful termination against the Service and a breach of the duty of fair representation against the union. Id.

With respect to the apportionment of damages as between the Service and the Union, the Court held:

> It is true that the employer discharged the employee wrongfully and remains liable for the employee's backpay. The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damage suffered by the employee, the union is responsible for the increase in damages and, as between the two wrongdoers, should bear its portion of the damages

Id. at 223 (citation and footnote omitted).

In so holding, the Court created an apportionment rule pursuant to which the employer is responsible only for those damages

incurred by the employee through the date of the arbitration award which would have occurred had the union pressed the employee's case in good faith. The union is responsible for the increased damages which are incurred from the date of the tainted arbitration decision through judgment in the district court.

In explaining the rationale underlying its ruling, the Court stated, "Just as a nonorganized employer may accept an employee's waiver of any challenge to his discharge as a final resolution of the matter, so should an organized employer be able to rely on a comparable waiver by the employee's exclusive representative." Id. at 226.

Applying this rationale to the instant matter, the court was concerned that Local 569's acquiescence in F & M's transfer policy, prior to the raising of any complaint by plaintiff, constituted the type of "waiver" discussed above. If this interpretation were correct, the employer would be absolved from all liability, and plaintiff's cause of action

would stand only against his union.

However, Bowen explicitly recognized that "this is not a situation in which either the union or the employer has participated in the other's breach." Id. at 223, n.11 (citing Vaca v. Sipes, 386 U.S. 171, 197 n.18). In the passage cited from Vaca, the Court, relying on relevant N.L.R.B. authority, noted that in such situations the employer and the union would be held jointly and severally liable.

As this language clearly indicates, Bowen does not wholly excuse an employer's breach of the collective bargaining agreement, even where the union participated in or endorsed the breach. Instead, Bowen and its "waiver" discussion apply only in the context of post-grievance liability apportionment. Because this is a case in which the employer and the union concede that the transfers were made with the union's approval, the employer and the union are jointly and severally liable for any § 301 breaches arising out of the transfer policy prior to the arbitration decision. This

analysis assumes that plaintiff can prove that the arbitration decision was tainted by the Local's breach of the duty of fair representation.

Accordingly, F & M's motion for summary judgment is hereby denied.

IT IS SO ORDERED DATED: AUGUST 2, 1991

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Findings of Fact and Conclusions of Law, Judgment on Court Trial and Judgment on Special Verdict - March 18, 1992

This case came on regularly for trial on July 16, 1991. Jury verdicts on bifurcated issues were returned on July 24, 1991 and August 22, 1991. Remaining non-jury issues were tried on January 28 and 29, 1992. Plaintiff appeared as his own attorney. Louis Levy, Esquire appeared for Defendant Local 569 and Terrence Yellig, Esquire appeared for Defendant IBEW.

On the first bifurcated jury trial against Local 569 IBEW only, the jury found in favor of defendant and against plaintiff on Count Six of plaintiff's First Cause of Action alleging Breach of the Duty of Fair Representation in connection with the Fischback & Moore, Inc. to Corbin Dykes Company.

On the second bifurcated jury trial, immediately following the first verdict and

before the same jury, the jury returned answers to special questions covering all remaining jury trial causes of action not previously removed by pre-trial Orders of the Court as follows:

We, the Jury in the above-entitled action, find on each of the questions submitted to us, as follows:

Question No. 1.

Has plaintiff proved by a preponderance of the evidence that Local 569 violated its duty of fair representation towards plaintiff by acting in an arbitrary, discriminatory, or bad faith manner, by encouraging, suggesting, or requesting plaintiff's rejection from employment with Atkinson Mechanical Contractors on or about October 24, 1986?

Please answer "Yes" or "No."

Answer: No .

If you answered Question No. 1 "No," do not answer Questions No. 2 or No. 3, but go directly to Question No. 4. If you answered Question No. 1 "Yes," please answer the next

question.

Question No. 2.

Has plaintiff proved by a preponderance of the evidence that he has sustained any injury or economic damage as a legal result of the actions you have found by the Local 569 in Question No. 1?

Please answer "Yes" or "No."

Answer: _____.

If you answered Question No. 2 "No," do not answer No. 3, but go directly to Question No. 4. If you answered Question No. 2 "Yes," please answer the next question.

Question No. 3.

What injury or economic damage has plaintiff proved by a preponderance of the evidence?

Answer: $_____.

Question No. 4.

Has plaintiff proved by a preponderance of the evidence that the Local 569 violated its duty of fair representation towards plaintiff in an arbitrary, discriminatory or bad faith

manner, when it removed plaintiff from the out-of-work list after receiving a written complaint from another member of Local 569, Gary Degener, alleging that plaintiff was working outside the contractual jurisdiction area of Local 569?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 4 "No," do not answer Questions No. 5 or No. 6, but go directly to Question No. 7. If you answer Question No. 4 "Yes," please answer the next question.

Question No. 5.

Has plaintiff proved by a preponderance of the evidence that he sustained injury or economic harm as a legal result of Local 569's action described in Question No. 4 above?

Please answer "Yes" or "No."

Answer: Yes .

If you answer Question No. 5 "No," do not answer Question No. 6, but go directly to Question No. 7. If you answered Question No.

5 "Yes," please answer the next question.

Question No. 6.

What damages for injury or economic harm has plaintiff proved he sustained as a legal result of Local 569's action described in Question No. 4 above?

Answer: $ 26,400.00 .

Question No. 7.

Has plaintiff proved by a preponderance of the evidence that Local 569 violated its duty of fair representation by arbitrarily, discriminatorily or in bad faith demoting him from Group No. 1 to Group No. 2 in May, 1987?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 7 "No," do not answer Question No. 8 or No. 9, but go directly to Question No. 10. If you answered Question No. 7 "Yes," please answer the next question.

Question No. 8.

Has plaintiff proved by a preponderance of the evidence that Local 569's demotion from

Group No. 1 to Group No. 2 was a legal cause of injury or economic harm to plaintiff?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 8 "No," do not answer Question No. 9, but go directly to Question No. 10. If you answered Question No. 8 "Yes," please answer the next question.

Question No. 9.

What amount of damages based upon injury or economic harm has plaintiff proved by a preponderance of the evidence he has sustained as a legal result of Local 569's actions?

Answer: $39,600.00 .

Question No. 10.

Has plaintiff proved by a preponderance of the evidence that defendant International Brotherhood of Electrical Workers (IBEW) breached its Constitution by failing to act on plaintiff's appeal to the IBEW President of the second Trial Board decision suspending and fining plaintiff for wronging union member

Charles Morrison?

Please answer "Yes" or "No."

Answer: No .

If you answered Question No. 10 "No," do not answer Question No. 11 or No. 12, but go directly to Question No. 13. If you answered Question No. 10 "Yes," please answer the next question.

Question No. 11.

Has plaintiff proved by a preponderance of the evidence that the IBEW's breach of the Constitution was a legal cause of any injury or economic harm to plaintiff?

Please answer "Yes" or "No."

Answer: _____.

If you answered "No" to Question No. 11, do not answer Question No. 12, but go directly to Question No. 13. If you answered "Yes" to Question No. 11, please answer the next question.

Question No. 12.

What amount of damages based upon injury or economic harm has plaintiff proved by

a preponderance of the evidence he has sustained as a legal result of the IBEW's action?

Answer: $_____.

Question No. 13.

Has plaintiff proved by clear and convincing evidence that Local 569 violated plaintiff's Labor Management Reporting and Disclosure Act rights by intentionally re-submitting two by-law amendments to the union membership for vote, which had been proposed by plaintiff earlier, at a time when the plaintiff was suspended from attendance to Union membership meetings, and unable to speak in support of his proposed amendments?

Please answer "Yes" or "No."

Answer: Yes.

If you answered "No" to Question No. 13, do not answer Questions No. 14, No. 15, No. 16, or No. 17, but go directly to Question No. 18. If you answered Question No. 13 "Yes, please answer Question No. 14.

Question No. 14.

Do you find nominal damages in favor of Plaintiff as a legal result of Local 569's acts in Question No. 13?

Please annswer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question NO. 14, do not answer Question No. 15, No. 16 or No. 17, but go directly to Question No. 18. If you answered "Yes" to Question No. 14, please answer Question No. 15.

Question No. 15.

What amount of nominal damages do you find in plaintiff's favor against Local 569 as a legal result of its acts of Question No. 14?

Answer: $ 500.00 .

Question No. 16.

Has plaintiff proved by clear and convincing evidence that the Local 569's conduct described in Question No. 13 was motivated by ill will or a purpose to harm plaintiff's interest?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 16 "No," do not answer Question No. 17, but go directly to Question No. 18. If you answered Question No. 16 "Yes," please answer Question No. 17.

Question No. 17.

What amount of punitive damages has plaintiff proved by clear and convincing evidence against Local 569?

Answer: $ 2,000.00 .

Question No. 18.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the first Trial Board on the Charles Morrison complaint for any or all of the following respects:

1) Failure to serve on plaintiff specific written charges?

Answer "Yes" or "No."

Answer: No .

2) Failure to give plaintiff a reasonable time to prepare for the hearing?

Answer "Yes" or "No."

Answer: No .

3) Failure to accord plaintiff a full and fair hearing?

Answer "Yes" or "No."

Answer: No .

If you answered "No" to all of the above questions, do not answer Questions No. 19, No. 20, No. 21, or No 22, but go directly to Question No. 23. If you answered Question No. 18 "Yes" as to one or more of the sub-parts, please answer Question No. 19.

Question No. 19.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 18 above?

Please answer "Yes" or "No."

Answer: _____.

If you answered "No" to Question No. 19, do not answer Questions No. 20, No. 21, or No. 22, but go directly to Question No. 23. If you answered "Yes" to Question 19, please go to the

next question.

Question No. 20.

What amount of damages do you find by clear and convincing evidence plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 in Question No. 18 above?

Answer: $_____.

Question No. 21.

Has plaintiff proved by clear and convincing evidence that Local 569's conduct described in Question No. 18 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: _____.

If you answered Question No. 21 "No," do not answer Question No. 22, but go directly to Question No. 23. If you answered Question No. 21 "Yes," please answer the next question.

Question No. 22.

What amount of punitive damages do you find in favor or plaintiff and against Local

569 as a legal result of the conduct you found in Question No. 18 above?

Answer: $_____.

Question No. 23.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the second Trial Board on the Charles Morrison complaint in any or all of the following respects:

1) Failure to serve on plaintiff specific written charges?

Answer "Yes" or "No."

Answer: No.

2) Failure to accord plaintiff a full and fair hearing?

Answer "Yes" or "No."

Answer: Yes.

If you answered "No" to both of the above two questions, do not answer Questions No. 24, No. 25, No. 26 or No. 27, but go directly to Question No. 28. If you answered

Question No. 23 "Yes" as to one or more of the sub-parts, please answer Question No. 24.

Question No. 24.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 23 above?

Please answer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question 24, do not answer Questions No. 25, NO. 26 or No. 27, but go directly to Question No. 28. If you answered "Yes" to Question 24, please answer Question No. 25.

Question No. 25.

What amount of damages do you find by clear and convincing evidence plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 in Question No. 23 above?

Answer: $ 0 .

Question No. 26.

Has plaintiff proved by clear and

convincing evidence that Local 569's conduct described in Question No. 23 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question 26 "No," do not answer Question No. 27, but go directly to Question No. 28. If you answered Question No. 26 "Yes," please answer the next Question No. 27.

Question No. 27.

What amount of punitive damages do you find in favor of plaintiff and against Local 569 as a legal result of the conduct you found in Question 23 above?

Answer: $ 500.00 .

Question No. 28.

Has plaintiff proved by clear and convincing evidence that defendant Local 569 violated his Labor Management Reporting and Disclosure Act rights in its handling of the third Trial Board resulting in plaintiff's six-

year expulsion and $6,000 fine in any or all of the following aspects?

1) Failure to serve on plaintiff specific written charges:

Answer "Yes" or "No."

Answer: Yes .

2) Failure to give plaintiff reasonable time to prepare for the hearing?

Answer "Yes" or "No."

Answer: No .

If you answered "No" to Question No. 28, do not answer Questions No. 29, No. 30, No. 31 or No. 32, but go directly to Question No. 33. If you answered "Yes" to Question No. 28, Please answer Question No. 29.

Question No. 29.

Has plaintiff proved by clear and convincing evidence that he sustained any injury or economic harm as a legal result of the acts you found in Question No. 28 above?

Answer "Yes" or "No."

Answer: Yes .

If you answered "No" to Question 29, do

not answer Questions No. 30, No. 31 or No. 32, but go directly to Question 33. If you answered "Yes" to Question 29, please answer the next Questions No. 30 and No. 31.

Question No 30.

What amount of damage do you find by clear and convincing evidence that plaintiff has sustained for injury or economic harm as a legal result of the conduct you found committed by Local 569 as presented in Question No. 28 above?

Answer: $ 6,000.00 .

Question No. 31.

Has plaintiff proved by clear and convincing evidence that Local 569's conduct as described in Question No. 28 above was motivated by ill will or a purpose to harm plaintiff's interests?

Please answer "Yes" or "No."

Answer: Yes .

If you answered Question 31 "No," do not answer Question 32, but go directly to No. 33. If you answered Question No. 31 "Yes," please

answer the next Question No. 32.

Question No. 32.

What amount of punitive damages do you find in favor of plaintiff and against Defendant Local 569 as a legal result of the conduct you found in Question No. 28 above?

Answer: $ 37,400.00 .

Question No. 33.

Has plaintiff proved by clear and convincing evidence that any or all of the defendants violated their fiduciary duties toward Local 569 by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569?

Please answer "Yes" or "No."

Answer: Yes .

Question No. 34.

Has plaintiff proved by a preponderance of the evidence that either or both of the following defendants intentionally inflicted severe emotional distress on plaintiff?

	Yes	No
1) Gary Degener	X	-
2) Ron Whitaker	___	X

If you answered Question No. 34 "No as to both defendants, do not answer any further questions, but have your foreperson date and sign this verdict form and return it to the court.

If you answered Question No. 34 "Yes," please answer the next question.

Question No. 35.

Has plaintiff proved by a preponderance of the evidence that he has sustained any injury or economic harm as a legal result of the conduct you found against either or both of the above-named defendants?

Please answer "Yes" or "No."

Answer:

As to Degener: Yes.

As to Whitaker: No.

If you answered Question No. 35 "No" as to both defendants, do not answer any more

questions, but have your foreperson date and sign the verdict form and return it to this court.

If you answered "Yes" as to either of the defendant[s] named above, please answer the next question.

Question No. 36.

What amount of compensatory damages has plaintiff proved by a preponderance of the evidence as to either or both defendants?

Answer: Gary Degener $ 0 .

Ron Whitaker $ 0 .

Question No. 37.

Has plaintiff proved by clear and convincing evidence that either or both of the above-named defendants acted toward plaintiff with malice or oppression?

Answer "Yes" or "No."

Answer: Yes .

If you answered Question No. 37 "No," do not answer any further questions, but have your foreperson date and sign the verdict form and return it to this court.

If you answered Question No. 37 "Yes," please answer the next question.

Question No. 38.

What do you assess against either or both defendants by way of punitive damages?

Answer:

Gary Degener $ 1,500.00 .

Ron Whitaker $ 0 .

DATED: 8/22/91 . Earlene Abeson
FOREPERSON

With respect to the non-jury trial of the three remaining equitable issues, the Court now enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. VALIDITY OF LOCAL 569 BUILDING TRADES COUNCIL ASSESSMENT

FINDINGS OF FACT

1. For at least the last 25 years, defendant Local 569 has paid a per capita payment monthly to the San Diego Building Trades Council for each member employed in the construction industry.

2. No evidence was presented as to the original source of authorization for this

payment by the defendant Local 569 to the San Diego Building Trades Council.

3. The International Brotherhood of Electrical Workers (IBEW) is affiliated with the Building and Trades Department of AFL-CIO, and pays a per capita assessment to that department for each IBEW member engaged in the construction industry.

4. The payment by defendant Local 569 is drawn from the general fund of the Local, which in turn is made up of union dues and assessments, within which is a member assessment for all members engaged in the construction trade.

5. By prior order of this Court, plaintiff is not subject to the .50 increase in this assessment which was invalidly assessed by the defendant Local 569 on _____.

CONCLUSIONS OF LAW

1. Plaintiff has failed to prove by a preponderance of evidence that the original assessment, presently in the amount of $1.25

per member per month, violates any by-law, regulation or practice of defendant Local 569.

2. In absence of proof, the Court will not presume irregularity or invalidity of the assessment.

3. Judgment on the San Diego Building Trades Council assessment shall be for defendant Local 569 IBEW and against plaintiff.

B. TRANSMITTER ISSUE

FINDINGS OF FACT

1. The Transmitter is a monthly newspaper published by defendant Local 569 under the editorial policy control of the ex officio Business Manager of the defendant Local 569.

2. The Transmitter has been used during 1986, 1987, 1988, 1989, 1990 and 1991 to publish articles criticizing plaintiff for his views and his actions in filing (and sometimes winning) lawsuits against defendant Local 569 and the IBEW.

3. Since at least 1986, plaintiff has run unsuccessfully for election as Business Manager of Local 569 and is a potential opponent.

4. The monthly articles criticizing plaintiff appear to have political themes as well as themes of conflict over plaintiff's lawsuits and plaintiff's claims of union officers' improper conduct.

5. Plaintiff requested, but has been denied, any space in the Transmitter with which to counter the adverse written campaign carried on against him in the Transmitter.

6. Plaintiff has periodically published his own news circular criticizing the officers of Local 569, and asserting various improprieties and violations of law by management of the Local.

7. Prior to the present office-holders, members had been invited to publish their views in the Transmitter. Plaintiff did not avail himself of that opportunity during those earlier years.

8. The Local's present management uniformly prohibits any access to Transmitter space by any union member.

CONCLUSIONS OF LAW

1. To the extent the Transmitter is being used as a campaign tool of incumbent management, it is a violation of 29 U.S.C. § 481, which falls within the jurisdiction of the Department of Labor in the form of post-election remedies, but not in the U.S. District Court in the first instance.

2. To the extent the Transmitter is being used to criticize a member for the member's criticisms and lawsuits filed against the Local, since it is not done discriminatorily only against plaintiff, and since the Transmitter is uniformly unavailable to any member, plaintiff's denial of access is not being imposed unequally. The Court considers the use of the Transmitter to attack plaintiff to be an abuse of the use of the Transmitter, but it does not seem to be reached by 29 U.S.C. §411(a) or (b). See Murphy v. Intern. Union of Operating Engineers, 774 F.2d 114, 129-132 (6th Cir. 1985), since the denial of access to the Transmitter is uniformly followed. Cf. Knox

County Local v. National Rural Letter Carriers' Ass'n., 720 F.2d 936 (6th Cir. 1984).

3. Judgment against plaintiff will be entered on this issue.

C. RECONSIDERATION OF THE ISSUE WHETHER THE LOCAL 569'S DENIAL OF A MEMBER'S RUNNING SIMULTANEOUSLY FOR THE POSITION OF CONVENTION DELEGATE AND BUSINESS MANAGER

The Court declines to reconsider its prior order granting summary judgment in favor of the defendant Local 569 on the grounds that the policy is a reasonable one to be followed, and the Court should not intrude into internal union affairs in the absence of a violation of established principles of law. See Furniture Moving Drivers v. Crowley, 467 U.S. 526, 539 (1983); Calhoun v. Harvey, 379 U.S. 134, 140 (1964).

NOW, THEREFORE, based on the Jury's Special Verdicts and the Findings of Fact and Conclusions of Law by the Court, and the Court being fully advised in the premises, hereby enters the following:

JUDGMENT

1. Plaintiff is awarded $26,400 plus

costs of suit as damages against Local 569, IBEW on his claim against Local 569, IBEW based upon removal of plaintiff from the out-of-work list after receiving written complaint from Mr. Gary Degener.

2. Additionally, plaintiff is awarded $39,600 plus costs of suit against Local 569, IBEW as damages on his claim based upon demoting plaintiff from Group I to Group II in May, 1987.

3. Additionally, plaintiff is awarded $500 plus costs of suit against Local 569, IBEW on his claim for damages based upon re-submitting by-law amendments earlier proposed by plaintiff to the union membership at a time when the plaintiff was suspended from attendance at union membership meetings.

4. In addition, plaintiff is awarded $2,000 as punitive damages against Local 569, IBEW based upon the same claim.

5. Plaintiff is awarded no damages, compensatory or punitive, on his claim against Local 569, IBEW based upon the jury's finding

of a failure to accord plaintiff a full and fair hearing in the second Trial Board trial on the Charles Morrison complaint; however, it is the judgment of this Court that such Trial Board judgment shall be and is hereby reversed and the fine imposed of $500 shall be and is Ordered returned to plaintiff forthwith with interest according to law.

Although the jury found punitive damages of $500 for this claim, the Court declines to adjudge them as the jury found no compensatory damages upon which to base their award of punitive damages on this claim.

6. Additionally, on plaintiff's claim based on the Third Trial Board resulting in plaintiff's expulsion from Local 569, IBEW and $6,000 fine, judgment is entered for plaintiff and against defendant Local 569, IBEW in the sum of $6,000 compensatory damages, and $37,400 punitive damages.

7. In addition, it is the judgment of the Court that plaintiff be reinstated retroactive to the date of his expulsion, and restored to

all his rights and privileges then accrued to him, and that the defendant Local 569, IBEW credit plaintiff with full payment of all applicable dues to the date of plaintiff's reinstatement.

8. Additionally, the Court enters Declaratory Judgment that defendants violated their fiduciary duties toward Local 569, IBEW by overseeing, allowing, or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569. Court costs of suit are awarded to plaintiff on this claim.

9. Additionally, on plaintiff's claim against Gary Degener, based upon intentional infliction of emotional distress, plaintiff shall recover judgment against defendant Gary Degener the sum of no dollars compensatory damage. Although the jury found punitive damages of $1,500 against defendant Degener, the Court declines to award judgment for any sum of punitive damages in view of the jury's

finding of no compensatory damages sustained by plaintiff arising out of the said conduct by defendant Degener. Court costs are awarded to plaintiff on this claim and against defendant Degener.

10. Judgment is entered in favor of defendant Ron Whitaker and against plaintiff, with costs of suit to said defendant.

11. NOW, THEREFORE, as a result of the above, Judgment shall be entered in favor of the plaintiff Lawrence V. Moore and against Defendant Local 569, IBEW in the total of $72,500 as compensatory damages, and $39,400 as punitive damages, plus plaintiff's costs of suit.

Judgment shall be entered in favor of plaintiff and against defendant Gary Degener but for zero dollars, plus costs of suit to plaintiff.

Judgment shall be entered in favor of defendant Ron Whitaker and against plaintiff Lawrence V. Moore, with costs of suit to defendant Ron Whitaker.

Judgment shall be entered in favor of defendant IBEW and against plaintiff with costs of suit to defendant.

Declaratory judgment shall be entered under the Fourth Cause of action against defendants Paul Blackwood, Wayne Lovin, Jim Westfall, Tom Pridemore, Joe Heisler, Dick Smith, Terry Godshalk, Keith Widdop, George England, Kris Hartnett, Don Withem, Steve Workman, Mike Reilly, John Simpson, Ray Altmeyer, Richard White, Jim Brandon, Sharon Hahn, Bob Riel, Jim Aylsworth and Charles Wilder, declaring that said defendants violated their fiduciary duties toward Local 569, IBEW, by overseeing, allowing or ratifying pension contributions at the rate of 48 hours per week on behalf of all the full time paid officers and union staff employees of Local 569, IBEW.

Costs of suit are awarded to plaintiff on this claim.

IT IS FURTHER THE ORDER, JUDGMENT AND DECREE of this Court that, based upon the evidence in this case and the Jury Special

Verdict, the third Trial Board Judgment is reversed and the defendant Local 569, IBEW reinstate plaintiff Lawrence V. Moore to active membership in said union Local 569 and the IBEW, retroactive to the date of expulsion, with restoration of all rights and privileges accrued on the date of expulsion; further that plaintiff be credited with full payment of all dues and assessments which would have been paid during the period of expulsion to the date of his reinstatement.

Costs of suit to the plaintiff on this claim.

Finally, judgment is hereby entered in favor of defendant Local 569 for declaratory relief on the issues of election procedure and use of Transmitter, as set forth in the Findings of Fact and Conclusions of Law herein, and aginst plaintiff Lawrence V. Moore, with defendant's costs of suit incurred on said claims. Dated: March 11, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE MOORE, Plaintiff-Appellee, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JAMES WESTFALL; TOM PRIDEMORE; JOE HEISLER; DICK SMITH; TERRY GODSHALK, et al. Defendants-Appellants.	CA No. 92-55515 DC No. CV-87-172 -RMB(HRM)

LAWRENCE MOORE, Plaintiff-Appellant, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; PAUL BLACKWOOD; WAYNE LOVIN; JAMES WESTFALL; TOM PRIDEMORE; JOE HEISLER; DICK SMITH; TERRY GODSHALK et al; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; J.J. BARRY; S.R. McCANN; RICHARD ROBBINS; ATKINSON MECHANICAL; FISCHBCH FISCHBACH & MOORE, INC., Defendants-Appellees.	CA No. 92-55517 DC No. CV-87-172 -RMB(HRM)

LAWRENCE MOORE, Plaintiff-Appellee, v. LOCAL UNION 569 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; BILLY SMITH; RAY ALTMEYER; S.R. McCANN Defendants-Appellants.	)	CA No. 93-55381 DC No. CV-87-172 -RMB(HRM) MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

Argued and Submitted March 9, 1994
Pasadena, California

WALLACE, Chief Circuit Judge; FARRIS, and KLEINFELD, Circuit Judges:

I. APPEAL BY LOCAL 569

The jury's verdict included the following findings: (1) Local 569 violated its duty of fair representation by removing Moore from an "out of work" list and assigning him a lower hiring preference; (2) Local 569's officers and staff employees breached their fiduciary duties by overseeing pension contributions on their

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behalf that violated the union's bylaws; and (3) a disciplinary hearing held on March 5, 1990 violated Moore's right to a full and fair hearing under the LMRDA. On appeal, Local 569 argues that the district court erred in denying its motion for judgment notwithstanding the verdict on the first and third claims, and that we should reverse the jury's verdict on the second claim. The record satisfies us that there is substantial evidence to support the jury's verdicts. We affirm. Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1370-71 (9th Cir. 1987).

A. Duty of Fair Representation

Under Section 9 of the LMRA, 29 U.S.C. 159, a union has a duty of fair representation "'to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" United Steelworkers v. Rawson, 495 U.S. 362, 372 (1990) (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)). The duty of fair

representation extends to a union's administration of a hiring hall pursuant to a collective bargaining agreement. Breininger v. Sheet Metal Workers, 493 U.S. 67, 87-90 (1989); NLRB v. Iron Workers Local 433, 600 F.d 770, 773, 776-77 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980).

Local 569 contends that it removed Moore from the "out of work" list because he was working as an electrician for another IBEW local in different city. Local 569 also asserts that it required Moore to register in a group with a lower priority for job referrals because he had not accumulated sufficient hours of employment with signatory employers to maintain his high priority status. In both instances, Local 569 followed procedures specified by the collective bargaining agreement and the union's bylaws.

However, Moore and four other witnesses testified that Local 569 selectively and arbitrarily enforced its hiring hall rules as part of a campaign to punish him for

challenging the union's leadership. Local 569 mistakenly argues that it could not have breached its duty of fair representation so long as it acted pursuant to the collective bargaining agreement and the union's written policies. A union breaches its duty when it enforces its hiring hall policies against a dissident member in a discriminatory manner. NLRB v. Laborers' Int'l. Union, Local 300, 613 F.2d 203, 207-08 (9th Cir. 1980). Although there is conflicting evidence in the record, a reasonable juror could have credited the testimony of Moore and his witnesses and concluded that Local 569 arbitrarily chose to enforce the rules in Moore's case and ignore them in others.

B. Breach of Fiduciary Duties

When a complaint alleges that a union officer personally benefitted from a labor organization's expenditure, the officer must establish both a valid authorization, after adequate disclosure, and that the expenditure was not manifestly unreasonable. Ray v. Young,

753 F.2d 386, 389-91 (5th Cir. 1985); Morrissey v. Curran, 650 F.2d 1267, 1272-75 (2nd Cir. 1981); cf. Stelling v. IBEW Number 1547, 587 F.2d 1379, 1389 (9th Cir. 1978), cert. denied, 442 U.S. 944 (1979) (deferring to a union officer's interpretation of a union constitution unless the interpretation is "patently unreasonable"). Local 569 failed to satisfy the jury that the membership ever authorized the pension contributions. Local 569 described the process by which the membership authorized the salaries of the local officers and staff employees. But this alone did not establish that the membership authorized the pensions.

C. Improper Discipline Claim and Damage Awards

Under Section 101 (a) (5) of the LMRDA, 29 U.S.C. 411 (a) (5), before a union member may be disciplined (except for non-payment of dues), a union must do three things: (1) serve the member with written, specific charges, (2) give a reasonable time to prepare a defense, and (3) provide a full and fair hearing. 29

U.S.C. 411 (a) (5); Building Material and Dump Truck Drivers, Local 420 v. Traweek, 867 F.2d 500, 510 (9th Cir. 1989). The jury found clear and convincing evidence that Local 569 failed to give Moore written notice of the charges against him as required by Section 101 (a)(5).

Local 569 emphasizes the evidence which indicates Moore might have received the requisite written notice. The union separately mailed--by regular delivery and registered mail--two written notices of the charges and hearing. Moore appeared at the hearing on time, appeared to be aware of the charges, and was prepared to defend himself against the charges. He also declined to request a continuance. Previously, Moore falsely had claimed that he had not received written notice of another disciplinary hearing.

On the other hand, there is evidence to support the jury's finding. Moore testified that he never received any written notice, but learned about the charges and the hearing through other members. He also testified that

he inquired about getting a written copy of the charges prior to the hearing. And Local 569 did not produce a receipt from the registered letter with Moore's signature.

The jury determines matters of credibility. Moore v. Local Union 569 of the IBEW, 989 F.2d 1534, 1546 (9th Cir. 1993). A reasonable juror could have found Moore's testimony credible and found that he had not received written notice.

Local 569 argues that the jury's compensatory damage award of $6,000 was unsupported by the evidence and excessive. In Brett v. Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union, Local 879, 828 F.2d 1409 (9th Cir. 1987), we restated the standard for determining if a jury has awarded excessive damages:

> Absent a total want of evidence on all or certain portions of the case, or the erroneous exclusion . . . of appropriate matters or a showing of bias or prejudice on the part of the jury, this court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous . . . .

Id., at 1417 (quotations and cites omitted). Moore described his damages to a jury, as did an accountant who testified as an expert witness for Moore. They testified that Moore was fined $6,000 by the union and that during his suspension, which had lasted for two years at the time of the trial, he was denied access to the union's hiring hall. Local 569 emphasizes that Moore failed to introduce documentary evidence corroborating these damages. But the testimony by Moore and his expert witness, if believed, supports the jury's compensatory damage award of $6,000. Bise v. IBEW, Local 1969, 618 F.2d 1299, 1305 (9th Cir. 1979), cert. denied, 449 U.S. 904 (1980).

Local 569 further contends that the $36,000 in punitive damages award was also excessive. Moore testified that Local 569 repeatedly denied his requests to read the written charges. The jury found that Local 569's "ill will" towards Moore motivated its actions. The jury's finding that Local 569

maliciously violated Moore's LMRDA rights supports the award of punitive damages. Bise, 618 F.2d at 1306.

The record does not support Local 569's contention that the punitive damages award must be reduced because it would seriously impair the union's ability to serve its members.

II. CROSS-APPEAL BY MOORE

A. Motion to Disqualify Counsel and Award of Attorneys' Fees

Moore brought a motion to disqualify Local 569's counsel from representing the individual defendants accused of violating their fiduciary duties under Section 501 of the LMRDA, 29 U.S.C. 501. Finding that Moore had not demonstrated a reasonable likelihood of success on his Section 501 claim, the district court denied Moore's motion and required him to pay the attorney's fees incurred by Local 569 in opposing the motion. Eventually, however, Moore did prevail on this claim. The district court may well have properly reconsidered its award of attorneys' fees if Moore had made the

appropriate timely request. The record reflects that he did not. We find no error in the failure of the court to sua sponte revisit the issue. It was not error to make the award at the time that the court made it.

The district court acted within its discretion when it declined to order the individual defendants to reimburse Local 569 for the pension contributions and the cost of their defense. Union funds should not be used to defend officers against charges that they fraudulently deprived members of their rights or committed offenses that were "'seriously detrimental to the union and its membership.'" Kerr v. Shanks, 466 F.2d 1271, 1277, (9th Cir. 1972) (quoting Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962)), cert denied, 412 U.S. 918 (1973). Although Moore contended that some officers were taking a month's worth of benefits for only a week's worth of work, the district court did not find that the local officers acted fraudulently or that the members suffered a serious detriment. In fact, there

was evidence that crediting the officers and staff employees with 48 hours a week of pension contributions put less money in their pension accounts than if they had been credited for the actual hours worked.

B. Claims Against Fischbach and Moore, Inc. and Local 569

Moore claimed that one of his employers, Fischbach and Moore, Inc., had violated the regional collective bargaining agreement by transferring some its employees to a subsidiary without first seeking referrals from Local 569's hiring hall. Moore also alleged that Local 569 breached its duty of fair representation under the LMRA by condoning Fischbach's practices. The district court properly bifurcated Moore's fair representation and breach of contract claims, and correctly dismissed the claim against Fischbach after the jury found for Local 569. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-72 (1976) (holding that an employee who challenges the finality of an arbitration proceeding must first demonstrate that the union breached its

duty of fair representation before proceeding against an employer for breach of a collective bargaining agreement). Moore was not prejudiced by the district court's exclusion of prejudicial and irrelevant evidence. The record supports the denial of Moore's motions for judgment NOV or a new trial.

C. Claims Against Atkinson Mechanical Contractors, Inc. and Local 569

Moore claimed that another contractor, Atkinson Mechanical Contractors, Inc., breached the regional collective bargaining agreement by wrongfully refusing to hire him. Moore also claimed that Local 569 violated its duty of fair representation by asking Atkinson to reject him.

Atkinson argues that Moore does not have standing to sue it for breaching the collective bargaining agreement. Because Moore was not employed by Atkinson at the time they rejected him, Atkinson contends he was neither a member of the bargaining unit covered by the agreement nor a third party beneficiary to the agreement. In Karo v. San Diego Symphony Orchestra Assoc.,

762 F.2d 819, 821-22 (9th Cir. 1985), a union musician alleged that a symphony had breached a collective bargaining agreement by failing to hold auditions to fill an opening for a percussionist, and that the union breached its duty of fair representation by acquiescing. Because the agreement protected only employees of the symphony, we held that the plaintiff did not have standing to sue the union. Id. And because the terms of the agreement did not indicate the audition procedure was for the benefit of nonemployee union members, we further held that the plaintiff did not have standing as a third party beneficiary to sue the symphony. Id. See also, Sepulveda v. Pacific Maritime Assoc., 878 F.2d 1137, 139-41 (9th Cir.) (finding that longshoremen whom a union did not register as "best qualified" applicants did not have standing to sue either the union or the employer), cert. denied, 493 U.S. 1002 (1989).

Moore had standing to sue Local 569 and Atkinson for alleged improprieties in the

hiring hall referral procedures. Pursuant to the regional collective bargaining agreement, Local 569, unlike the unions in Karo and Sepulveda, operates a hiring hall. In Breininger, the Supreme Court held that a district court had jurisdiction over an unemployed union member's suit which alleged the union breached its duty of fair representation in the administration of a hiring hall. 493 U.S. at 71, 73-85. The Breininger Court was not called upon to decide the issue of jurisdiction over a breach-of-contract suit against an employer. But in discussing Breininger's fair-representation claim, the Court repeatedly stated that it could have been accompanied by a breach-of-contract suit against the employer. Breininger, 493 U.S. at 80-85.

Nevertheless, the district court properly granted summary judgment for Atkinson on Moore's breach-of-contract claim. The agreement allowed an employer to reject an employee, provided the employer did not

discriminate on the basis of union activity or race, sex, and other similar grounds. In rejecting Moore because he was litigious and disruptive, Atkinson did not breach the terms of the agreement. The record also supports the jury's verdict on Moore's fair-representation claim against Local 569. The district court properly denied Moore's motions for judgment NOV or a new trial.

D. Election Claims

Local 569 and the IBEW prohibited Moore from seeking election as a union officer and a delegate at the same time. The district court granted summary judgment dismissing Moore's claim that this policy violated his rights under the LMRDA. We dismiss Moore's claim for lack of subject-matter jurisdiction.

Federal courts lack jurisdiction over a claim that challenges the rules governing the eligibility of candidates for union office. Calhoon v. Harvey, 379 U.S. 134, 138-41 (1964); see also Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986) (stating that

an appellate court always must consider subject-matter jurisdiction). There is an exception allowing for jurisdiction when the plaintiff claims that the union applied its election rules in a discriminatory manner. Kupau v. Yamamoto, 622 F.2d 449, 454 (9th Cir. 1980). There is no evidence that Local 569 and the IBEW applied the eligibility rules unevenly.

Moore also claims that Local 569 and the IBEW committed other violations of the LMRDA during the 1986 election campaign. Moore had previously sought relief for these claims through an action filed with the Department of Labor. The department and Local 569 settled these claims. Another district court approved the settlement. The record supports the court's conclusion that res judicata barred Moore from relitigating.

E. Fiduciary Duty Claims

Moore contends that the district court improperly limited his breach of fiduciary duties claim to the issue of Local 569's

pension contributions on behalf of its officers and staff employees. The district court correctly determined that this was the only breach of fiduciary duty claim included in Moore's complaint that raised a triable issue of fact.

F. Personal Jurisdiction

The district court properly dismissed Moore's claims against J.J. Barry, the president of the IBEW, for lack of personal jurisdiction and correctly denied Moore's motion for default judgment against Barry. After Barry moved to dismiss for lack of personal jurisdiction, Moore bore the burden of coming forward with facts supporting personal jurisdiction. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). Moore failed to establish that Barry could reasonably have anticipated "being haled into court" in California. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,297 (1980). "[A] corporate officer who has contact with a forum only with regard to the performance of his official duties is not

subject to personal jurisdiction in that forum." Forsyth v. Overmyer, 576 F.2d 779, 783-84 (9th Cir.) (citing Chem Lab Products, Inc. v. Stepanek, 554 F.2d 371 (9th Cir. 1977)), cert. denied, 439 U.S. 864 (1978). Nothing in the record indicates that Barry conducted any activity on his own behalf in California.

G. Other Claims Against the IBEW

The district court properly dismissed Moore's claims that the IBEW and its officers violated his rights under Title I or Section 609 of the LMRDA. Moore did not present evidence that the IBEW or its officers acted in bad faith, were guilty of fraud, or ratified any of the allegedly wrongful acts of Local 569 "'with full knowledge . . . of an overall scheme to suppress dissent in violation of the LMRDA.'" Moore v. Local Union 569, 989 F.2d 967, 973 (2d Cir. 1987)). The district court also properly concluded that Moore had not presented sufficient evidence to support his claim that the IBEW and its officers breached

the IBEW constitution by, among other things, refusing to approve bylaw amendments proposed by Moore. Stelling, 587 F.2d at 1389 (holding that courts should defer to a union officer's interpretation of a union's constitution unless it is "patently unreasonable"). Furthermore, the district court appropriately denied Moore's motions for judgment NOV or a new trial regarding the jury's finding that the IBEW and its officers did not breach the IBEW Constitution in their handling of Moore's appeals from Local 569's disciplinary hearings. Id.; Landes Constr. Co., 833 F.2d at 1370-71, 72.

H. Jury Instructions

Claiming that the district court's jury instructions were flawed, Moore seeks the reversal of the district court's denial of his motions for judgment NOV and a new trial on a number of issues. Moore failed to object to the jury instructions at trial. Federal Rule of Civil Procedure 51 bars him from raising this issue for the first time in his appeal.

Hammer v. Gross, 932 F.2d 842, 847 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 582 (1991).

I. District Court's Management of the Trial

The district court did not abuse its discretion by limiting the amount of time the parties had to present their cases. Moore did not suffer any prejudice as a result of these limitations. During the trial, the court generously extended the time available to Moore.

J. Building Trades Assessment Claim

Because Moore was never accorded class representative status as to his claims that challenged the increase in the building trades assessment owed by each member of Local 569, the district court correctly declined to order Local 569 to refund the increase to all the members of Local 569. In addition, the district court properly denied his request for a jury trial on this claim. Moore was seeking only declaratory and injunctive relief.

III. AWARD OF ATTORNEYS' FEES TO MOORE

Most of the time during this litigation, Moore proceeded as plaintiff in pro per. Part of the time, though, he was represented by two attorneys. The district court did not abuse its discretion in awarding Moore attorneys' fees. A court may award attorneys' fees to a plaintiff who prevails on claims brought under the LMRA or the LMRDA if the plaintiff's success confers "substantial benefit" on his fellow union members. Hall v. Cole, 412 U.S. 1, 4-9 (1973); Southerland v. International Longshoremen, Local 8, 845 F.2d 796, 798-90 (9th Cir. 1987). A plaintiff who vindicates his rights under the LMRDA may confer substantial benefits on fellow union members even though the court awarded damages only to the individual plaintiff or denied the plaintiff any monetary relief whatsoever. Southerland, 845 F.2d at 799-90. The district court did not commit clear error in finding that Moore had conferred substantial benefits on his fellow union members by successfully pursuing his claims against Local 569. Id. at

799.

We find no abuse of discretion in the amount of attorneys' fees awarded to Moore. The district court made it clear that it had "considered the relationship between the amount of the fee awarded and the results obtained." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Rivera v. City of Riverside, 763 F.2d 1580, 1582 (9th Cir. 1985), aff'd, 477 U.S. 561 (1986). Local 569 contends that the district court failed to comply with the twelve criteria set forth in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1970), cert. denied, 425 U.S. 951 (1976). In its attorneys' fee order, the district court did not explicitly address all twelve of these criteria. Instead the district court focused on the number of hours worked by the attorneys, their hourly fees, and the extent that Moore succeeded on his claims. The Kerr court stated that "[t]he failure to consider [the twelve] factors constitutes an abuse of discretion." Kerr, 526 F.2d at 70. More recently, however, we have relaxed the

standard, and stated that "application of at least some of, or the most relevant, factors may be sufficient for review on appeal." Jordan v. Multnomah County, 815 F.2d 1258, 1263 n. 11 (9th Cir. 1987).1

Finally, the district court properly limited the award of costs and expert witness fees to Moore. He sought costs that were not allowable under 28 U.S.C. 1920. Further, as the court did not appoint his expert witness, it could not award fees in excess of the limit set by 28 U.S.C. 1821 (b). Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987).

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1. "Although we do not sanction the district court's failure to explicitly set forth its consideration of the Kerr factors, we believe that the court's decision, which sets forth a consideration of the most relevant factors, is sufficiently detailed for meaningful review on appeal." Probe v. State Teachers' Retirement System, 780 F.2d 776, 785 (9th Cir.), cert. denied, 476 U.S. 1170 (1986).

AFFIRMED.